

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

<i>In Re Application to Assign Licenses under Second</i>)	
<i>Thursday Doctrine, Request for Waiver and Extension</i>)	FCC File No. 0005552500
<i>of Construction Deadlines, and Request to Terminate</i>)	
<i>Hearing</i>)	
)	
<i>Application to Assign Licenses from Maritime</i>)	
<i>Communications/Land Mobile, LLC, Debtor-in-</i>)	
<i>Possession, to Choctaw Holdings, LLC</i>)	

TO: Chief, Wireless Telecommunications Bureau

**COMMENTS OF
CRITICAL INFRASTRUCTURE COMPANIES**

**Atlas Pipeline Mid-Continent LLC
Dixie Electric Membership Corporation, Inc.
Enbridge Energy Company, Inc.
EnCana Oil & Gas (USA) Inc.
Jackson County Rural Electric Membership Corporation**

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Corporation***

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<i>In Re Application to Assign Licenses under Second Thursday Doctrine, Request for Waiver and Extension of Construction Deadlines, and Request to Terminate Hearing</i>)	
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<i>Application to Assign Licenses from Maritime Communications/Land Mobile, LLC, Debtor-in-Possession, to Choctaw Holdings, LLC</i>)	
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By their attorneys and pursuant to the Public Notice released by the Federal Communications Commission (“Commission”) on March 28, 2013,¹ Atlas Pipeline Mid-Continent LLC (“Atlas”), Dixie Electric Membership Corporation, Inc. (“DEMCO”), Enbridge Energy Company, Inc. (“Enbridge”), EnCana Oil & Gas (USA) Inc. (“Encana”), and Jackson County Rural Electric Membership Corporation (“Jackson County REMC”) (collectively, the “*CII Companies*”), hereby submit these Comments urging the Commission to grant their long-pending assignment applications either through *Second Thursday* or by favorable action on the

¹ *Comment Sought on Application to Assign Licenses Under Second Thursday Doctrine, Request for Waiver and Extension of Construction Deadlines, and Request to Terminate Hearing*, Public Notice, DA 13-569, March 28, 2013 (*Second Thursday Public Notice*).

CII Companies' pending *Petition for Reconsideration*² of the *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing* (“*HDO*”) in this proceeding.³

I. SUMMARY

The *CII Companies* individually seek the assignment of spectrum from Maritime Communications/Land Mobile LLC (“Maritime”) for private, internal applications, in furtherance of their provision of safe and efficient energy services to the American public. Few if any other spectrum alternatives are available to satisfy their communications requirements.⁴

Each of the *CII Companies* is included within the definition of Critical Infrastructure Industry (“CII”) companies under the Commission’s rules.⁵ All acted in good faith in dealing with Maritime, and none has been accused of any “wrongdoing” in the *HDO* or otherwise. All are justifiably frustrated after years of delay in processing their applications.

During the course of the hearing proceeding against Maritime, which was initiated more than two years ago (several years *after* many of the assignment applications were filed), four critical infrastructure companies (one oil and gas company, and three electric utilities) voluntarily withdrew their applications due to the continued delay, expense and uncertainty of the Commission’s processes.⁶ The remaining *CII Companies*: Atlas, DEMCO, Enbridge, Encana,

² See, *CII Companies' Petition for Reconsideration*, filed May 19, 2011 (EB Docket No. 11-71).

³ *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, FCC 11-64 (*rel.* Apr. 19, 2011)(“*HDO*”).

⁴ The *CII Companies* plan to use this AMTS spectrum to support critical infrastructure communications functions, including Supervisory Control and Data Acquisition (“SCADA”) systems related to the operation of pipelines and liquefied natural gas (“LNG”) facilities in the oil and gas industry, and smart grid and other CII functions in the electric utility industry.

⁵ CII companies are defined in the Commission’s rules to include electric utilities, oil and gas companies, and railroads. 47 C.F.R. § 90.7.

⁶ DCP Midstream, LP (the oil and gas company) and Interstate Power and Light Company, Wisconsin Power and Light Company, and Denton County Electric Cooperative, Inc., d/b/a (COSERVE Electric (three electric utilities).

and Jackson County REMC – three oil and gas companies⁷ and two rural electric cooperatives⁸ – urge the Commission to grant their applications at long last either through *Second Thursday* or by favorable action on their *Petition for Reconsideration* of the *HDO* in this proceeding.⁹

II. BACKGROUND

In 2005, Maritime claimed a “very small” business bidding credit of 35 percent during the auction of Automatic Maritime Telecommunications Service (AMTS) licenses in Auction 61. After a 12-month investigation, the Commission determined that Maritime was entitled “only to a 25 percent bidding credit as a small business.”¹⁰ The Commission ordered Maritime to pay the difference in the bidding credits, granted Maritime’s applications, and issued the area-wide AMTS licenses at issue in this proceeding.¹¹

At that time, there were no other adverse rulings against Maritime on the public record nor was any further enforcement action pending against the company. Rather, from all appearances, Maritime had rectified its previous deficiencies regarding the status of its bidding credits and its licenses were free and clear of any encumbrances.

Maritime thereafter began marketing their licenses to the energy industry under the Commission’s “secondary markets” decision, which authorized licensees to partition and

⁷ Atlas, Enbridge, Encana.

⁸ DEMCO, Jackson County REMC.

⁹ Applications for Commission Consent to Assignment of Various Authorizations to Encana (FCC File Nos. 0003388394 and 0004030479), Jackson County REMC (FCC File No. 0004310060), Enbridge (FCC File No. 0004430505), DEMCO (FCC File No. 0004507921) and Atlas (FCC File No. 0004526264).

¹⁰ See, *In Re Maritime Communications/Land Mobile LLC, Application for new Automated Maritime Telecommunications System Stations*, Order, DA 06-2368 (rel. Nov. 27, 2006).

¹¹ *Id.*

disaggregate their spectrum.¹² Because the public record reflected Maritime's status as an authorized Commission licensee, the *CII Companies* in good faith separately negotiated at arms' length their respective purchases of spectrum. From November 2009 through March 2011, contracts were finalized and the referenced applications to assign small portions of Maritime's AMTS licenses to the *CII Companies* were duly filed with the Commission.

On April 19, 2011, the Commission released the *HDO* designating for hearing Maritime's licenses and pending applications, including those involving the *CII Companies*. The primary issue identified for hearing was whether Maritime improperly claimed bidding credits as a small business during AMTS Auction 61 in 2005.¹³

In short, having previously disqualified Maritime as a "very small" business, finding it should have been classified as only a "small business," the Commission switched gears six years later in the *HDO* and questioned whether Maritime was legitimately entitled even to small business status. Meanwhile, the *CII Companies* and others who entered into spectrum purchase agreements with Maritime in the intervening years based on Maritime's apparently clean slate as a Commission licensee, were left in limbo.

Maritime's 12 proposed assignees included four oil and gas companies, seven electric utilities, and one railroad. The *HDO* permitted only the railroad, the Southern California Regional Rail Authority (SCRRA), to show cause why its application should be "*removed from the ambit of the hearing proceeding and granted*" due to its pressing need to use this spectrum for Positive Train Control (PTC).¹⁴

¹² Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 20604 (May 15, 2003).

¹³ See, *HDO* at ¶2. and its licenses were free and clear of any encumbrances.

¹⁴ *HDO* at fn 7.

On May 19, 2011, the *CII Companies* filed a *Petition for Reconsideration* of the *HDO* supporting the removal of SCRRA from the hearing but challenging why the *CII Companies*' applications were treated differently from the similarly-situated railroad applicant.¹⁵

In August 2011, Maritime filed for bankruptcy protection in a federal court in Mississippi.¹⁶ The Bankruptcy Court subsequently approved Maritime's assumption of its individual contracts with the *CII Companies*.

On November 15, 2012, the Bankruptcy Court approved Maritime's plan of reorganization permitting Choctaw Holdings, LLC ("Choctaw") to acquire the right, title and interest in Maritime's licenses subject to approval by the Commission.

On January 23, 2013, Maritime and Choctaw filed an application to assign four geographic and 59 site-based AMTS licenses from Maritime to Choctaw under the Commission's *Second Thursday* doctrine ("Choctaw Assignment Application").¹⁷

On March 28, 2013, the Commission released its *Second Thursday* Public Notice asking whether the Choctaw Assignment Application and the *CII Companies*' related assignment applications should be granted.

III. COMMENTS

A. The *CII Companies* Require Maritime's AMTS Spectrum to Support Mission Critical Communications

The *CII Companies* sought in good faith to acquire AMTS spectrum from Maritime to support private, internal communications systems in furtherance of their provision of safe and

¹⁵ *CII Companies*' Petition for Reconsideration.

¹⁶ See, August 1, 2011, Bankruptcy filing In Re Maritime Communications/Land Mobile, LLC, Voluntary Petition for Chapter 11 Bankruptcy, No. 11-13463 (N.D. Miss. filed Aug. 1, 2011).

¹⁷ FCC File No. 0005552500.

efficient energy services to the American public. The *CII Companies* turned to Maritime, because Maritime's public record was unchallenged by the Commission and there were no other suitable spectrum alternatives readily available to satisfy their communications requirements.

1. The Oil and Gas Companies' Use of AMTS Spectrum (Atlas, Enbridge, Encana).

There are roughly 170,000 miles of hazardous liquid pipelines, 295,000 miles of gas transmission pipelines and 1.9 million miles of gas distribution pipelines in the United States.¹⁸ Pipelines covering thousands of miles must have equipment to control the movement of the commodity, including pumps and compressors to provide force, and valves to control pressure or change position to direct the commodity flow.¹⁹ Pressure, flow and other equipment are customarily monitored and remotely controlled wirelessly by Supervisory Control and Data Acquisition (SCADA) systems overseen by personnel in central control rooms often miles away from the pipeline or facility.

In 2009, the Pipeline and Hazardous Materials Safety Administration (PHMSA) issued a final rule amending the pipeline safety regulations governing control room management for pipelines where controllers use SCADA systems.²⁰

Without the AMTS spectrum or other suitable spectrum, some of these companies would be forced to operate a Spread Spectrum SCADA system. Under the FCC's rules, these operations are unlicensed and the operator must not cause harmful interference to other users and must accept interference from an authorized radio station, another intentional or unintentional

¹⁸ 74 Fed. Reg. 63311 (Dec. 3, 2009).

¹⁹ *Id.*

²⁰ *Id.* This final rule mandated that by August 1, 2011, operators develop control room management procedures and that they implement those procedures by February 1, 2012. *Id.*

radiator, by industrial, scientific and medical (ISM) equipment, or by an incidental radiator.²¹

Safety and reliability are major concerns because the frequencies in this system are unmanaged and interference is common.

Atlas, Enbridge and Encana sought to acquire this AMTS spectrum from Maritime to enhance the reliability of their SCADA networks and comply with federal regulatory requirements. Atlas and Enbridge will use AMTS spectrum to operate wireless networks that enable them to remotely monitor their pipeline for leak detection, significantly decreasing the likelihood of an explosion or harm to the environment. Pipeline systems occasionally contain gas with dangerous quantities of Hydrogen Sulfide (H₂S), which can cause injury or death with exposure. Pipeline systems also may contain high quantities of oxygen (O₂), which can lead to pipeline corrosion. SCADA systems can allow monitoring of the H₂S levels and O₂ concentration within the pipeline systems, provide prompt automated warnings when dangerous levels are present and enable company personnel to correct the problem and prevent harmful exposure and corrosion.

Enbridge and Encana rely on the AMTS spectrum to support an enhanced SCADA network for the companies' gas wells in Texas and Louisiana. The critical nature of reliable gas flow control, data collection and monitoring of gas wells spurred these companies to acquire AMTS spectrum to support a more reliable SCADA System on licensed AMTS frequencies. Environmental, health and safety issues are impacted by the reliability of these networks. Both companies employ personnel who carefully monitor wells from a central control room where the wells can be remotely shut to prevent spills. The SCADA systems also monitor well pressure and temperature to detect potential problems and prevent gas emissions or spills. Surface casing

²¹ 47 C.F.R. § 15.9(b).

pressures are monitored centrally to detect any leaks that may occur. Many of the facilities monitored by these companies include wells located in or near residential areas. They invested in dedicated spectrum and enhanced wireless equipment and systems to meet federal requirements and to improve reliability of their pipeline operations.

2. The Electric Utilities' Use of AMTS Spectrum (DEMCO, Jackson County REMC).

Electric utilities, like the oil and gas companies, are reliant on this AMTS spectrum to increase system automation, reliability, safety, and efficiency. With substantial support from the Commission and others in the federal government, electric utilities across the country are implementing smart grid and other advanced communications systems and are becoming progressively more dependent on automation to provide critical services. Spectrum is a key component in developing, deploying and operating these advanced systems.

Recognizing the trend toward automation, the Commission dedicated an entire chapter of its National Broadband Plan to spectrum options in support of smart grid deployment.²² The federal government as a whole has invested billions of dollars in private companies, utilities, manufacturers and cities to aid in smart grid deployment.²³ DEMCO and Jackson County REMC plan to use SCADA systems for emergency operations during power outages, to provide real-time monitoring and notification of abnormal events that may occur on the power line system, and to control certain equipment remotely. Maintaining reliable and secure communications during emergency response conditions is critical to restoring power to hospitals, care centers,

²² The National Broadband Plan is available at <http://www.broadband.gov/plan/> (last visited, May 9, 2013).

²³ See, *President Obama Announces \$3.4 Billion Investment to Spur Transition to Smart Energy Grid*, available at <http://www.energy.gov/8216.htm> (last visited May 9, 2013).

government offices and homes. SCADA systems also have led to increased reliability and decreased outage restoration times.

Jackson County REMC's system is used to promptly de-energize a section of line in the event of a vehicle accident or when employee safety is a concern. These functions would be compromised without the AMTS spectrum.

DEMCO is a rural electric cooperative providing electric service to more than 97,000 locations throughout seven rural parishes in Louisiana. The DEMCO region served as a staging area during Hurricane Katrina, providing assistance to many federal and state agencies. DEMCO's existing channels do not provide enough capacity for emergency operations even during small outages and the subject AMTS spectrum is needed for DEMCO to properly serve the citizens of Louisiana in times of emergency response.

B. The Commission Should Grant The Choctaw Application And The CII Companies' Assignment Applications under Second Thursday.

The Choctaw Assignment Application may be granted under the Commission's *Second Thursday* doctrine if the alleged wrongdoer(s) will either derive no benefit from grant of the application or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.²⁴ It is understood that if the FCC approves the Choctaw Assignment Application, some of the licenses subsequently will be partitioned and assigned by Choctaw to the *CII Companies*. The Bankruptcy Court approved the assumption these sale agreements by Maritime as the Debtor-in-Possession and later approved the Plan of Reorganization ("Plan") assigning Maritime's rights and obligations to Choctaw. Choctaw has committed to honoring the

²⁴ See *Second Thursday Corp., Memorandum Opinion and Order*, 22 FCC 2d 515 (1970) ("Second Thursday MO&O"), recon. granted in part, 25 FCC 2d 112 (1970).

contracts with the *CII Companies*.²⁵ To protect the contractual rights of the *CII Companies* as established in the Bankruptcy proceeding, the Commission should condition any assignment to Choctaw on the requirement that Choctaw in turn file applications for the assignment of the appropriate partitioned licenses to the *CII Companies*.

The *CII Companies* urge the Commission to grant their applications via *Second Thursday*. Although the general policy, established in the context of broadcast applications, is that the Commission will not assign a license until issues relating to the underlying authorization are resolved,²⁶ as the Commission noted in the *Second Thursday Public Notice* that policy is not without exception when the public interest requires assignment²⁷ to an innocent assignee even during a pending enforcement action against the licensee.²⁸

The Commission has found that the weight for allowing free transferability of licenses is greater in the non-broadcast context (such as exists here) than in the broadcast context:

In view of these significant differences between broadcast and nonbroadcast services, we believe that no valid purpose would be served here by applying our broadcast policy of prohibiting

²⁵ See, FCC Applications For Assignments of Authorization and Transfers of Control, File No. 0005552500, submitted Jan 23, 2013, “Description of Transaction, Public Interest Statement and Second Thursday Showing,” at p. 3.

²⁶ See *Jefferson Radio, Inc. v. FCC*, 340 F.2d 781, 783 (D.C. Cir. 1964) (“*Jefferson*”); cf. [Stereos Broadcasters, Inc. v. FCC](#), 652 F.2d 1026, 1027 (D.C. Cir. 1981) (“*Stereos Broadcasters, Inc.*”), citing, [Northland Television, Inc.](#), 68 F.C.C.R. 1566, 43 Rad. Reg. 2d (P & F) 1567 (1978) for the proposition that permitting a licensee to evade the consequences of alleged or adjudicated misconduct by transferring its interest or assigning its license will diminish the deterrent effect that revocation or renewal proceedings should have on licensees and will allow them to benefit despite their course of conduct. See also [Northwestern Indiana Broadcasting Corp.](#), 60 FCC 2d 205, 209-10 (1976).

²⁷ *Second Thursday Public Notice*, p 2. See also, *Second Thursday Corp.*, Memorandum Opinion and Order, 22 FCC 2d 515 (1970), recon. granted, Memorandum Opinion and Order, 25 FCC 2d 112 (1970); *Hertz Broadcasting of Birmingham, Inc.*, Memorandum Opinion and Order, 57 FCC 2d 183, 184-85 (1976) (evidentiary hearing terminated on basis of principal's disabling illness; station sale permitted for no profit); and *Lois I. Pingree*, Memorandum Opinion and Order, 69 FCC 2d 2179, 2183-84 (1978) (no-profit sale permitted where disability provides mitigation for wrongdoing).

²⁸ *Cellular System One of Tulsa*, Memorandum Opinion and Order, 102 FCC 2d 86, at ¶¶ 9-10 (1985) (“*Cellular System One of Tulsa*”); *Little Rock Radio Telephone Company, Inc.*, Memorandum Opinion and Order, 89 F.C.C. 2d 400, at ¶¶ 21-22 (1982).

transfers when there are outstanding character issues to be resolved against the transferor. The facts in this case reveal clearly that no harm to the public will occur by excepting these applications from our normal policy and, that, to the contrary, the public interest will be served by a transfer of these facilities to a qualified applicant Thus, we will allow the transfer.²⁹

The decision of whether to approve a license transfer “turns upon a balancing of the public interest considerations favoring the free transferability of the licensee’s interest against the Commission’s long-term interest in deterrence to determine whether, on the whole, the public interest weighs in favor of free transferability.”³⁰ Applying this balancing test, the Choctaw Assignment Application and *CII Companies*’ subsequent assignment applications should be granted here, where innocent third parties acting in good faith otherwise will be irreparably harmed. The Commission has found that deferring “actions on all of the licenses held by a multiple licensee pending a final resolution of character issues raised by alleged misconduct may operate to the detriment of the public interest.”³¹ That is precisely the case here.

This spectrum is urgently needed by electric utilities and oil and gas companies pursuant to federal mandate for use in emergencies and for other critical applications involving the protection of life and property. While the benefit to the individual *CII Companies* and the public at large in their respective service areas will be great, the total amount of spectrum to be assigned

²⁹ *Applications of Cablecom-General, Inc.*, 87 FCC2d 784, 790-791 (1981). (Allowing a transfer of control involving applications in several non-broadcast services including the Cable Television Relay Service (CARS); point-to-point common carrier microwave radio service; and the satellite communications service).

³⁰ *Id.* Applying this balancing test in allowing the transfer of a cellular license interest, the Commission concluded, “we find that the interest in deterrence is outweighed by the more immediate and substantial public interest in the development of efficient and competitive cellular systems.” *Id.*, at ¶10

³¹ *Cellular System One of Tulsa, Memorandum Opinion and Order*, 102 FCC 2d 86, at ¶8 (1985). “An agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Otis L. Hale d/b/a Mobilfone Communications*, Order to Show Cause and Memorandum Opinion and Order Designating Applications for Hearing, 1985 FCC LEXIS 2389, at ¶13 (“Mobilfone”) citing *Haney v. Chaney*, 470 US 821, 831 (1985). In *Mobilfone*, applying Supreme Court precedent, the Commission upheld the Common Carrier Bureau’s initial decision not to initiate enforcement action against certain licenses of Mobilfone, even as other licenses were being designated for hearing.

to the *CII Companies* is but a fragment of Maritime's larger geographic and site-specific licenses.

In its *Second Thursday* Showing, Choctaw represents that the alleged bad actors (the DePriests) have no role in Choctaw and will play no future role with respect to any of the licenses subject to the instant application nor will they derive any benefit from the sale of the licenses.³² With that in mind, the *CII Companies'* long pending assignment applications finally should be granted.

C. Alternatively, the Commission Should Grant the *CII Companies'* Applications Through Favorable Action on their Longstanding *Petition for Reconsideration*

Among all of Maritime's proposed assignees (there originally were twelve: four oil and gas companies, seven electric utilities, and one railroad), the *HDO* permitted only SCRRA to show cause why its application should be "*removed from the ambit of the hearing proceeding and granted*" due to its pressing need to use this spectrum for Positive Train Control (PTC).³³

The Commission afforded SCRRA an opportunity to extract itself from the hearing because its purchase of AMTS spectrum was deemed necessary to comply with a federal mandate for PTC.³⁴ On May 19, 2011, the *CII Companies* filed a *Petition for Reconsideration* of the *HDO* supporting the removal of SCRRA from the hearing but challenging why the *CII Companies'* applications should be treated differently from the similarly-situated railroad

³² Choctaw Description of Transaction, Public Interest Statement and *Second Thursday Showing* p. 8 (FCC File No. 0005552500).

³³ *HDO* at fn 7.

³⁴ See *Rail Safety Improvement Act of 2008*, Pub. L. No. 110-432, filed Oct. 16, 2008, 122 Stat. 4848, 4856-57 § 104(a)(2008).

applicant.³⁵ The *CII Companies* pointed out that their requirements for this spectrum were as great as the railroad's, and legally they, too, should be removed from the hearing.

Like the railroad, the *CII Companies* are defined as "Critical Infrastructure" under the Commission's rules.³⁶ Like the railroad, the *CII Companies* require the use of this spectrum to comply with federal mandates. Like the railroad, the *CII Companies* need these frequencies to support critical and innovative new applications in the public interest, such as smart grids, advanced pipeline automation and electric distribution control. Like the railroad, the Commission has made available no other suitable spectrum to satisfy the *CII Companies'* pressing communications requirements. And, like the railroad, the *CII Companies* acted in good faith in their dealings with Maritime and are not alleged in the *HDO* to have done anything "wrong."

The *CII Companies* argued in their *Petition for Reconsideration* that nothing in the Commission's rules or prior decisions provided a legitimate basis for the Commission to distinguish among critical infrastructure companies or to elevate a railroad above similarly-situated electric utilities and oil and gas companies in terms of the public interest, convenience and necessity.³⁷

It is undisputed that the *CII Companies* have federal requirements and safety of life considerations similar to the railroad that, like the railroad, led them to seek AMTS spectrum from Maritime. For example, the PHMSA's rules require companies operating LNG facilities to have two reliable forms of communications that are not dependent upon each other at its

³⁵ *CII Companies* Petition for Reconsideration.

³⁶ 47 C.F.R. § 90.7.

³⁷ The *CII Companies* even offered to pay into escrow any additional amounts due under their contracts with Maritime and to take any other appropriate steps to ensure that no benefits would accrue to the alleged wrongdoers pending the outcome of the administrative hearing process.

facilities.³⁸ In addition, the PHMSA requires each operator of a pipeline facility³⁹ to have a communication system that provides for the transmission of information needed for the safe operation of its pipeline system.⁴⁰ The communications system at a minimum must: (1) monitor operational data, (2) receive notices from personnel, the public and public authorities of any abnormal/emergency conditions, (3) provide two-way vocal communications between a control center and the scene of any abnormal/emergency situation, and (4) communicate with fire, police, and other appropriate public officials during emergency conditions.⁴¹

Similarly, electric utilities are implementing smart grid and other advanced communications systems with the support of and pursuant to directives from the federal government. The Commission has held workshops focusing on smart grid deployment,⁴² federal smart grid loans and grants have been awarded throughout the country, and an entire chapter in the Commission's National Broadband Plan was devoted to the communications requirements necessary to support smart grid technologies.⁴³

³⁸ See 49 C.F.R. § 193.2519. This rule requires each LNG plant to have a primary communication system that provides verbal communication between plant personnel and plants with storage capacity in excess of 70,000 gallons to have a second communication system capable of providing verbal communications in the event of an emergency.

³⁹ A pipeline facility is any new or existing pipe, rights-of-way and any equipment, facility, or building used in the transportation of hazardous liquids or carbon dioxide. 49 C.F.R. § 195.2.

⁴⁰ 49 C.F.R. § 195.408(a).

⁴¹ 49 C.F.R. § 195.408(b).

⁴² For example, as the Commission was preparing the National Broadband Plan, it held a three-hour workshop on August 25, 2009, to discuss Smart Grid, Broadband and Climate change. See also *Comment Sought on the Implementation of Smart Grid Technology*, Public Notice, DA 09-2017 (rel. Sept. 4, 2009).

⁴³ *National Broadband Plan* at Ch. 12 (available at <http://download.broadband.gov/plan/national-broadband-plan-chapter-12-energy-and-environment.pdf>) (last visited May 9, 2011).

The *CII Companies* sought AMTS spectrum from Maritime to comply with federal law and for reliability and public safety reasons, much like SCRRA.⁴⁴ It is an unlawful abuse of discretion for the Commission to allow the railroad to extract itself from the hearing proceeding while not affording the same opportunity to electric utilities and oil and gas companies facing similar federal requirements and spectrum shortages.

On July 15, 2011, the *CII Companies*’ filed a *Request for Expedited Action* on their still pending *Petition for Reconsideration*, reiterating their pressing need for this spectrum and beseeching the Commission to act promptly and favorably on their request.⁴⁵ The *CII Companies* pointed out again that no other suitable spectrum was readily available to satisfy their communications requirements. No response was received from the Commission.

During prehearing conferences, the *CII Companies* repeatedly complained to the Presiding Administrative Law Judge (“ALJ”) of the Commission’s continuing delay in processing their applications and requested that the ALJ remove the applications from the scope of the hearing proceeding and grant them himself. The ALJ empathized with the applicants’ frustration but determined that “*his hands are tied*,” because he lacks the authority necessary to approve the applications.⁴⁶

I’m trying to think if there is anything it’s possible that I can do, and I’m, honestly, my hands are tied. And I know the frustration. I mean, I can’t believe that what I’m hearing here is that you’ve got such public interests hanging around... I’m

⁴⁴ In addition to these federal requirements and others, the Commission required private radio licensees to convert to narrower bandwidths or terminate operations on certain frequencies as of January 1, 2013. Some of the *CII Companies* were relying on access to the AMTS spectrum from Maritime as an alternative to mandatory narrowbanding. 47 C.F.R. § 90.205(b)(5).

⁴⁵ See, *CII Companies’ Request for Expedited Action*, filed July 15, 2011 (EB Docket No. 11-71).

⁴⁶ See, Transcript of October 25, 2011, Hearing at p. 266 available at <http://apps.fcc.gov/ecfs/document/view?id=7021747027> (last visited May 9, 2013).

frustrated. I don't know what I would do if I were in your situation. I don't know what you should do.⁴⁷

Since the ALJ believed that he was not authorized to act, and the Commission still had not ruled on their *Petition for Reconsideration* or their *Request for Expedited Action* after almost a full year, the *CII Companies* filed a *Second Request for Expedited Action* on June 27, 2012, reiterating their critical need for this spectrum to serve the public interest and again beseeching the Commission to act promptly and favorably on their request.⁴⁸ Again, no response was received from the Commission.

The *Second Thursday Public Notice* pointed out that although the exception in the *HDO* was directed solely at the application to assign spectrum to the railroad, the *CII Companies* had filed pleadings arguing that the same public interest considerations supported removal of the *CII Companies'* applications.⁴⁹ As noted in the Public Notice, the *Second Thursday* applicants “echo that request here, as an alternative to relief under *Second Thursday*.”⁵⁰

For the reasons outlined above, the *CII Companies* wholeheartedly support that approach and urge the Commission to grant their longstanding *Petition for Reconsideration*, remove their applications from the ambit of hearing, and grant them *post haste* outside the scope of *Second Thursday* if necessary.

IV. CONCLUSION

Through no fault of their own, the *CII Companies* – five Critical Infrastructure Companies representing different aspects of the energy industry – have been denied access to

⁴⁷ *Id.*

⁴⁸ See, *CII Companies' Second Request for Expedited Action*, filed June 27, 2012 (EB Docket No. 11-71).

⁴⁹ *Second Thursday Public Notice*, p. 3.

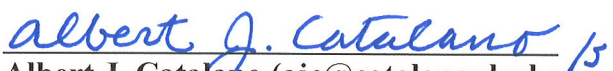
⁵⁰ *Id.*

much needed spectrum to satisfy their communications requirements. Although all of the proposed assignees acted in good faith in reliance on the Commission's secondary market decisions and Maritime's public status as a full-fledged, authorized Commission licensee, their applications have been held hostage to the Commission's enforcement action against Maritime for years. Further delay in processing the *CII Companies'* applications is unwarranted and detrimental to the public interest.


The Commission should remove all of the *CII Companies'* applications from the hearing and promptly grant them in the public interest either via *Second Thursday* or through favorable action on their longstanding *Petition for Reconsideration* of the *HDO*. Grant of the *CII Companies'* applications will provide critical infrastructure entities with spectrum urgently needed to serve the nation's citizens with core energy services especially in times of emergency and other events affecting the safety of life and property.

Under these circumstances, the public interest demands that the Commission authorize the immediate assignment of the partitioned licenses to the *CII Companies*.

Respectfully submitted,


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